

05-948 JAN 25 2006

No. 05-

===== ~~OFFICE OF THE CLERK~~
IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD M. SIMKANIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

=====
Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

Attorney for Petitioner

January 2006

QUESTIONS PRESENTED

1. The trial court twice instructed that petitioner's business "had a legal duty to collect, by withholding from the wages of its employees," the taxes petitioner was charged with willfully failing to withhold and pay over. To the second iteration of the instruction, delivered in response to a question from the deliberating jury, petitioner objected on the ground that the court was directing a finding on an element of the offense.

a. Should error which deprives the defendant of his Sixth Amendment right to trial by jury on a fact which is essential to the punishment be presumed to be prejudicial?

b. If such an instruction can be harmless, did the court below shift the burden from the government by relying on its observation (quoting from *Neder v. United States*, 527 U.S. 1, 18-19 (1999)), that the defendant "did not, and apparently could not, bring forth facts contesting" the government's position?

2. When the defendant in a criminal tax case advances a defense under *Cheek v. United States*, 498 U.S. 192 (1991), is the defendant entitled to an instruction explaining the concept of "good faith"?

3. Can punishment well above a federal sentencing guidelines range be justified, consistent with the First Amendment, on the theory that a non-violent first offender's deeply held anti-government political views and associations create a risk of recidivism equal to that of the most hardened criminal?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Simkanin and respondent United States).

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REASONS FOR GRANTING THE WRIT

1. This Court should either overrule its 1999 decision in <i>Neder v. United States</i> , or else distinguish it and reaffirm the 1983 plurality decision in <i>Johnson v. Connecticut</i> that prejudice is presumed from an instruction which takes an unstipulated factual question away from the jury	13
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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Richard M. Simkanin respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. The court below affirmed his convictions for tax offenses and resulting sentence of seven years' imprisonment.

OPINIONS BELOW

The Fifth Circuit's precedential Opinion (per King, Ch.J., with Davis, J., and Rosenthal, D.J. (S.D.Tx.)), was filed August 5, 2005; see *United States v. Simkanin*, 420 F.3d 397. A copy is attached as Appendix A. The United States District Court for the Northern District of Texas (McBryde, J.) did not write any opinion in the case.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit affirming the petitioner's convictions on federal tax charges was filed and entered on August 5, 2005. Appx. A; see *United States v. Simkanin*, 420 F.3d 397. Petitioner's timely petition for rehearing *en banc* was denied by Order filed October 27, 2005. This petition is being filed on or before the 90th day thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS
AND FEDERAL STATUTES INVOLVED*

The First Amendment to the Constitution of the United States provides, in pertinent part: "Congress shall make no law ... abridging the freedom of speech ..., or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend. I.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "No person shall ... be deprived of life, liberty, or property, without due process of law" U.S. Const., amend. V.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" U.S. Const., amend. VI.

The Federal Criminal Code, which is title 18 of the United States Code, provides, in pertinent part:

§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil ... service of the United States,

* The Statutes Involved, as highlighted here, are set forth in unexcerpted form as Appendix C to this Petition, together with additional statutes referenced by the court of appeals. See Appx. A, 420 F.3d at 405 n.5. The Fifth Circuit's opinion also refers to certain Internal Revenue Regulations as pertinent, citing "26 C.F.R. §§ 31.3121(a)-(d), 31.3306(a)-(c), 31.3401(a)-(d)." As no regulations with those precise citations exist, and petitioner in any event does not agree that any such regulations are "involved" -- at least not in matters addressed in this Petition -- they are not reproduced herein.

or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent shall be imprisoned not more than five years and shall be subject to a fine

18 U.S.C. § 287.

Subtitle A of the Internal Revenue Code ("Income Taxes") provides, in pertinent part:

§ 31. Tax withheld on wages.

(a) Wage withholding for income tax purposes.

(1) In general. The amount withheld as tax under Chapter 24 shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle.

26 U.S.C. § 31.

Subtitle C of the Internal Revenue Code ("Employment Taxes and Collection of Income Tax") provides, in pertinent part:

Chapter 21.--Federal Insurance Contributions Act

* * * *

Subchapter A.--Tax on Employees

§ 3101. Rate of Tax.

(a) Old-age, survivors, and disability insurance.

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) --

* * * *

(b) Hospital insurance.

In addition to the tax imposed by the preceding subsection, there is hereby imposed on the

income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) --

* * * *

§ 3102. Deduction of Tax from Wages.

(a) Requirement.

The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. ...

(b) Indemnification.

Every employer required so to deduct the tax shall be liable for the payment of such tax,

* * * *

26 U.S.C. §§ 3101-3102.

Subchapter B.--Tax on Employers

§ 3111. Rate of Tax.

(a) Old-age, survivors, and disability insurance.

In addition to other taxes, there is hereby imposed on the income of every employer an excise tax, with respect to having employees within his employ, equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) --

* * * *

(b) Hospital insurance.

In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every employer an excise tax, with respect to having employees within his employ, equal to the following percentages of the wages (as defined in section 3121(a)) received by him

with respect to employment (as defined in section 3121(b)) --

* * * *

§ 3121. Definitions.

(a) Wages.

For purposes of this chapter, the term "wages" means all remuneration for employment,

* * * *

(b) Employment.

For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, ... (i) within the United States; except that such term shall not include

--

* * * *

(d) Employee.

For purposes of this chapter, the term "employee" means --

* * * *

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee;

.... --

* * * *

26 U.S.C. §§ 3111, 3121.

Chapter 24.--Collection of Income Tax
at Source

* * * *

§ 3401. Definitions.

(a) Wages.

For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a